

30 minutes. The employees could not explain why TC failed to notify the FAA of the lighting outages, as required, on August 4, 2004, June 3, 2005, and June 4, 2005.

4. On November 23, 2005, the Norfolk Office issued a Notice of Apparent Liability for Forfeiture to TC in the amount of ten thousand dollars (\$10,000) for the apparent willful violation of Section 17.51(a) of the Rules.³ On December 23, 2005, the Norfolk Office received TC's response to the NAL requesting a reduction or cancellation of the proposed forfeiture. On October 20, 2006, the Enforcement Bureau ("Bureau") released the *Forfeiture Order*. The Bureau received TC's petition for reconsideration on November 20, 2006, requesting reduction or cancellation of the forfeiture.

III. DISCUSSION

5. The forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,⁴ Section 1.80 of the Rules,⁵ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*.⁶ In examining TC's petition, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and any other such matters as justice may require.⁷

6. In its petition for reconsideration, TC alleges that its violation was inadvertent and not willful and requests that the forfeiture be cancelled, citing *Vernon Broadcasting, Inc.*⁸ TC states that it instructed its employees on the notification procedures regarding lighting outages approximately 2 years before the agent's inspection and did not fail to manage its employees. TC asserts that the violation occurred solely because of employee error and that it promptly reprimanded this employee. TC states the chief engineer, while on a boat trip, called in the outage to the station, as soon as he observed it on June 5, 2006, and the station called the FAA. Accordingly, TC claims its violation was not conscious or deliberate, *i.e.*, willful. We disagree with TC's assertions. TC is required to comply with the Rules and should ensure that its employees are aware of and follow its internal procedures. TC owned an antenna structure, whose lights malfunctioned. It is irrelevant whether TC's general manager or chief engineer was aware of the outage before June 5, 2006. TC's employee logged the outage on June 3 and 4 but due to employee error failed to notify the FAA immediately. The FAA was not notified until June 5, 2006. The "Commission has long held that licensees and other Commission regulatees are responsible for the acts and omissions of their employees and independent contractors,"⁹ and the Commission has

³ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200632640004 (Enf. Bur., Norfolk Office, November 23, 2005) ("NAL").

⁴ 47 U.S.C. § 503(b).

⁵ 47 C.F.R. § 1.80.

⁶ 12 FCC Rcd. 17087 (1997), *recon. denied*, 15 FCC Rcd. 303 (1999).

⁷ 47 U.S.C. § 503(b)(2)(D).

⁸ *Vernon Broadcasting, Inc.*, Memorandum Opinion and Order, 60 RR 2d 1275, 1277 (1986) (fencing forfeiture cancelled because licensee regularly inspected fence and inspected it shortly before inspection, fence was vandalized between the time of its inspection and agent inspection, and there was no evidence that the licensee was aware of the broken fence or that it had failed to monitor the condition of the site).

⁹ *Eure Family Limited Partnership*, Memorandum Opinion and Order, 17 FCC Rcd 21861, 21863,-64, para. 7 (2002); *MTD, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 34 (1991)(holding that a company's reliance on an independent contractor to construct a tower in compliance of FCC rules does not excuse that company from a forfeiture); *Wagenvoord Broadcasting Co.*, Memorandum Opinion and Order, 35 FCC 2d 361 (1972) (holding a licensee responsible for violations of FCC rules despite its reliance on a consulting engineer); *Petracom of Joplin, L.L.C.*, 19 FCC Rcd 6248 (Enf. Bur. 2004)

“consistently refused to excuse licensees from forfeiture penalties where actions of employees or independent contractors have resulted in violations.”¹⁰ It is also well established that a mistake resulting in a rule violation is considered a willful violation.¹¹ TC’s behavior is also distinct from that in *Vernon Broadcasting*. In this case, TC instructed its employees on lighting procedures approximately 2 years prior to the instant violation, not shortly before the violation. TC did not remind its employees of the proper procedures after employees failed to follow those procedures in August 2004 and did not, prior to the inspection, regularly remind its employees of the lighting procedures. TC also provided no evidence that it recently or regularly inspected its light indicating system or recently viewed the structure lights before the outage.

7. In the event the forfeiture is not cancelled, TC again requests that the forfeiture be reduced on the basis of good faith efforts and history of compliance with the Rules. The Bureau denied its previous request to reduce the forfeiture based on good faith efforts to comply with the Rules, because it stated the agent notified TC of the outage via voicemail prior to it contacting the FAA. In a sworn statement, TC states that as part of routine maintenance TC’s voice mailbox was quickly emptied after a weekend, and it did not receive the agent’s message left on June 4, 2005.¹² TC asserts that its notification of the outage to the FAA on June 5, 2005 should constitute good faith efforts to comply with the Rules. Based on this new evidence, we agree and conclude a reduction based on good faith efforts to comply with the Rules is warranted. Therefore, we reduce the forfeiture from \$10,000 to \$8,000.

8. Regarding its history of compliance, TC again states, because the Bureau cancelled the forfeiture stemming from the 2001 matter, that it does have a history of compliance with the Rules. We disagree. Although we concluded that TC’s actions did not warrant a forfeiture, given TC’s good faith efforts to comply with the Rules and its history of compliance, we did not conclude that a violation had not taken place.¹³ In 2001, there was a light outage lasting more than 30 minutes that was not immediately reported to the FAA. Accordingly, a *Notice of Violation* was issued to TC on November 16, 2001. This *Notice of Violation* was not cancelled by the Bureau and constitutes a history of non-compliance with the Rules. Accordingly, we agree with the *Forfeiture Order* that a reduction based on history of compliance with the Rules is not warranted.

9. Therefore, there is no basis for reversal of the ultimate finding in the *Forfeiture Order* that TC willfully failed to exhibit obstruction lighting in violation of Section 17.51(a) of the Rules. However, we do grant a reduction of the forfeiture to \$8,000, based on TC’s good faith efforts to comply with the Rules.

(holding a licensee liable for its employee's failure to conduct weekly EAS tests and to maintain the "issues/programs" list).

¹⁰ *American Paging, Inc. of Virginia*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 10417, 10420, para. 11 (Enf. & Cons. Inf. Div., Wireless Tel. Bur. 1997) (quoting *Triad Broadcasting Company*, 96 FCC 2d 1235, 1244 (1984)).

¹¹ A violation resulting from an inadvertent mistake or a failure to become familiar with the Commission's requirements is considered a willful violation. See *North Country Repeaters*, 19 FCC Rcd 22139 (Enf. Bur. 2004); *PBJ Communications of Virginia, Inc.*, 7 FCC Rcd 2088 (1992); *Standard Communications Corp.*, 1 FCC Rcd 358 (1986); *Triad Broadcasting Co., Inc.*, 96 FCC 2d 1235 (1984).

¹² The agent left a voice message in TC’s general mailbox. According to the agent, he was not given the option of leaving a message for a specific individual.

¹³ See *Tidewater Communications LLC*, Memorandum Opinion and Order, 18 FCC Rcd 5524 (Enf. Bur. 2003) (“*Memorandum Opinion and Order*”).

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that, pursuant to Section 405 of the Communications Act of 1934, as amended,¹⁴ and Section 1.106 of the Commission's Rules,¹⁵ Tidewater Communications LLC's petition for reconsideration of the October 20, 2006 *Forfeiture Order* **IS** hereby **GRANTED IN PART AND DENIED IN PART**.

11. **IT IS ALSO ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,¹⁶ Tidewater Communications LLC **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of eight thousand dollars (\$8,000) for violation of Section 17.51(a) of the Rules.

12. Payment of the \$8,000 forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.¹⁷ Payment of the forfeiture must be made by check or similar instrument, payable to the order of the "Federal Communications Commission." The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106. Requests for full payment under an installment plan should be sent to: Associate Managing Director, Financial Operations, 445 12th Street, S.W., Room 1A625, Washington, D.C. 20554.¹⁸

13. **IT IS FURTHER ORDERED** that this Order shall be sent by regular mail and by certified mail, return receipt requested, to Tidewater Communications LLC at its address of record and to its attorney, Gary S. Smithwick, Smithwick & Belendiuk, P.C., 5028 Wisconsin Avenue, NW, Suite 301, Washington, DC 20016.

FEDERAL COMMUNICATIONS COMMISSION

George R. Dillon
Assistant Chief, Enforcement Bureau

¹⁴ 47 U.S.C. § 405.

¹⁵ 47 C.F.R. § 1.106.

¹⁶ 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4), 17.51(a).

¹⁷ 47 U.S.C. § 504(a).

¹⁸ See 47 C.F.R. § 1.1914.